Clifton, Brian

From: Haight, Carey
Sent: Tuesday, November 15, 2016 8:55 PM
To: Tim Wilkinson; Clifton, Brian; Jean Faure
Subject: Re:

Thanks, Tim.
Have a good night.

Carey Ann Haight :)
chaight@cascadecountymt.gov
Ph: 406-454-6915

From: Tim Wilkinson <wilkinsonfinehomes@gmail.com>
Sent: Tuesday, November 15, 2016 8:31 PM
To: Haight, Carey; Clifton, Brian; Jean Faure
Subject:

Carey and Brian,

I am concerned that the board is under the impression that if they feel that the conditions are met, they must approve the application; this view was asserted by Amy Berg in her earlier application material but was never corrected by staff. One of the Board members indicated in his comments concerning the Portage Solar application that he had no legal choice but to approve the application.

As you know in the Plains Grains case, the court held that the zoning board of adjustment had considerable discretion with respect to granting the special use permit even if all the prerequisite conditions are met. Further, the County zoning regulations for the UUP puts the burden of proof on the applicant.

It is important that the correct legal standard is articulated to the Board members and I ask that this be done during the hearing. Otherwise, it is unlikely that the hearing can be fair and impartial.

Thank you
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From: Haight, Carey
Sent: Tuesday, November 15, 2016 8:55 PM
To: Tim Wilkinson; Clifton, Brian; Jean Faure
Subject: Re: rebuttal

Thanks for your email Tim.

Carey Ann Haight :)
chaight@cascadecountymt.gov
Ph: 406-454-6915

From: Tim Wilkinson <wilkinsonfinehomes@gmail.com>
Sent: Tuesday, November 15, 2016 8:00 PM
To: Clifton, Brian; Haight, Carey; Jean Faure
Subject: rebuttal

Good evening Brian and Carey,

I was hoping to clear up a point of contention at the previous hearing. Neither the Zoning Board of Adjustment Rules of Procedure nor the County zoning regulations allow for a rebuttal by the applicant for an Application before the board, see Section V: Hearings, subsection D.

Rather a rebuttal is only allowed for an Appeal Hearings, see Section V: Hearings, subsection C.

Thank you,

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Tim

Clifton, Brian

From: Tim Wilkinson <wilkinsonfinehomes@gmail.com>
Sent: Monday, November 14, 2016 12:44 PM
To: Clifton, Brian; Haight, Carey; Jean Faure
Subject: RE: application

Brian, I'm assuming that you mean a lease agreement as a consent agreement would be court ordered document.

On Nov 14, 2016 11:32 AM, "Clifton, Brian" <bclifton@cascadecountymt.gov> wrote:

Tim,

The applicants have indicated that they will provide a consent agreement as provided for in 8.12(9). They intend to have that to us by the end of today or early tomorrow in which will then forward to the ZBOA and post on the website. Let me know if you have any other questions.

Brian

From: Tim Wilkinson [mailto:wilkinsonfinehomes@gmail.com]
Sent: Thursday, November 10, 2016 2:50 PM
To: Clifton, Brian <bclifton@cascadecountymt.gov>
Subject: Fwd: application

Brian, I attempted to email this to you earlier but I must have an old address. I also sent it to Carey.

---------- Forwarded message ----------
From: "Tim Wilkinson" <wilkinsonfinehomes@gmail.com>
Date: Nov 10, 2016 2:24 PM
Subject: application
To: "Clifton, Brian" <bclifton@co.cascade.mt.us>
Cc: "Haight, Carey" <chaight@cascadecountymt.gov>, "Jean Faure" <jfaure@faureholden.com>

Brian,

I am have been going through the "packet" for the upcoming Fox Solar application and it appears that the following zoning ordinance requirement was not yet been met in the current application. The applicable section reads as follows:

Section 8.12 (9)

Agreements/Easements: If the land on which the project is to be leased rather than owned by the solar energy development company, all property within the project boundary must be included in a recorded easement(s), lease(s), or consent agreement(s) specifying the applicable uses for the duration of the project and a copy provided with an Unclassified use permit application.

I was unable to find the pertinent information provided with the "Unclassified use permit application." Would you please provide a copy to me and see that it is included in the application.

Thank you,

Tim Wilkinson

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Thank you,

Tim Wilkinson

JACK H BLAINE AND RITA M THEISEN
9 STONERIDGE LN
GREAT FALLS, MT 59404

15 November 2016

Via email:
adachs@cascadecountymt.gov
bclifton@cascadecountymt.gov
chaight@cascadecountymt.gov

Cascade County Zoning Board of Adjustments
325 2nd Ave. North
Great Falls, MT 59401

Re: Cypress Creek Applications for Unclassified Use Permits [UUP]

Members of the Board:

It is a startling, extraordinary proposition, to construct a power producing plant in a residential neighborhood.[1] Such an extraordinary departure from what county landowners are entitled to expect from their property's residential status requires a compelling justification. Instead, there is no justification whatsoever – absolutely none.

The Circumstances

From the beginning of this process, some members of the Board have given the impression that the applicants are entitled to an unclassified use permit unless the neighbors can prove otherwise. In fact, the opposite is true. In the conditions set forth in the zoning rules for a UUP, the county has recognized the extraordinary nature of such a permit and expressly placed the burden on the applicant to prove it has met every condition.[2]

Not to hold the applicant to this high standard is to make a mockery of the county's own rules and to run roughshod over the rights of county residents. Not to hold the applicant to this high standard unleashes a torrent of applications because the applicants know they need not respect the limits of residential zoning. Not to hold the applicant to this high standard places county residents permanently on the defensive, never secure in their homes and neighborhoods from encroachment by incompatible uses. And what could be more incompatible, more inharmonious, to residents than a power producing plant smack dab in their midst and inescapably in their view.

And for what? What justification can there be for such a blatant disregard of the rights of county residents? No one has articulated a reason, and no one can. There is no benefit to the neighbors, who are passionately opposed and who credibly assert that their homes and property will be devalued by the visual

[1] This letter is addressed primarily to Fox Solar. Except where specifically addressing the Fox Solar location, the arguments presented apply equally to Portage Solar.
[2] The County Zoning Regulations require the applicant to present "sufficient factual evidence to support findings of fact that allow the Board to reasonably reach each of the required conclusions." [Sec. 18.8]

blight. There is no benefit to any county residents, who do not need the power and who may pay higher electric rates because of it.

Cascade County and the "Electric City" of Great Falls are not hurting for electric power. Montana is a net exporter of electricity to other states. [U.S. Energy Administration.] Why slam county residents to generate power that will not benefit the county or the state?

Regardless of where they are sited, these solar projects will actually cost taxpayers and Montana ratepayers. It is highly doubtful that they are economically feasible absent large federal tax credits[3] and mandatory power purchasing agreements (PPAs).[4] Indeed, the Montana Public Service Commission has expressed dismay over the proliferation of PPA requests from out-of-state developers seeking to profit from skewed PPA rates, and recognized a need to protect energy consumers "from unreasonably priced solar power."[5] The applicant has acknowledged that the MPSC's intention to correct the skewed PPA rates has diminished its appetite for constructing these types of projects in Montana. *Great Falls Tribune*, 30 June 2016.

So who benefits from the construction of this and similar projects? Two parties and two parties only: The project developer and the landowner who leases the property to the developer.

As noted above, the MPSC is concerned about out-of-state developers, which includes the applicant, seeking to profit from skewed PPA rates at the expense of local residents. Presumably these profiteers can continue to plunder the residents on some other parcel among the 94,109,440 acres in the State of Montana. Why, then, is the applicant so eager to build on this particular residential site? Because of its proximity to existing power lines, which reduces the developer's costs to connect to the public utility grid and thus increases its profits.[6] For the sole purpose of putting more of local ratepayers' money in their own pockets, the applicant seeks to up-end the residential zoning protections of those same ratepayers. This Board must not allow it.

The second party who benefits is the absentee landowner who intends to lease property to the developers. The landowner's interest is clear: Annual payments under a 20-year lease with the developer. But what makes the landowner's interest in personal gain superior to the interests of all of the neighbors who stand to lose? Nothing. A landowner of residential property has no reasonable expectation that the property could be leased for a power plant. In contrast, the landowner's neighbors have every expectation that they will not have to live with a power plant in their midst. The choice is one landowner's gain in exchange for the community's loss. The Board's duty is to the community.

At the public hearings on the solar projects held July 21, 2016, speakers in favor of the projects, besides the developer and the landowner who both seek financial gain, represented two other interests. One was agricultural. This speaker, representing the Montana Farmers Union, stated that farmers could benefit from leasing their agricultural land to solar developers. Perhaps that is true, but it is also irrelevant as applied to any project that is intended for a residential parcel. The other speakers were individuals who favor solar power generally,[7] who had no interest in or comment about the merits of the particular residential parcel in

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[3] 26 U.S.C. §48 provides a 30% tax credit on capital invested in commercial solar energy projects.
[4] PPAs are required by the Public Utility Regulatory Policy Act (16 U.S.C. §824a-3) and implemented by state public service commissions.
[5] See MPSC press release dated 16 June 2016.
[6] The applicant admitted as much to the Board [Minutes of June 16, 2016 meeting].
[7] One solar fan asserted that she would like to see solar plants erected all over Montana. State and local tourist boards might take issue with that particular vision of Utopia.

question, and who would not be affected by the construction of a project sited nowhere near their own residences. Their comments, too, were irrelevant. Neither they nor the agricultural representative attempted to address the legal conditions that the Board must consider before approving a UUP. Not one of their comments supports the specific application to construct a power plant in a residential neighborhood.

The Legal Standards

"An Unclassified Use Permit may be issued only upon meeting all requirements" in the zoning regulations. "The petitioner bears the burden of presenting sufficient factual evidence to support findings of fact that allow the Board to reasonably reach each of the required conclusions." [§18 and §18.8.] The application clearly fails at least two of the conditions, thus requiring the Commission to reject it.

1. The proposed development will substantially impact the value of adjoining property. [§18.5.2]

The developers of the Fox Solar project could scarcely have chosen a site more likely to have an adverse effect on the value of homes and home sites in the surrounding area. The solar plant would be located in the valley of the winding Missouri River, in full view of residents who chose their home sites – many of them perched high above the valley -- in large part because of the long and wide vistas of the river, the valley, and the mountain ranges beyond, expansive views for which Big Sky country is renowned.

Surely the Board is familiar with the real estate axiom that the prime factors in determining value are "location, location, location." A location with a magnificent view is more valuable than one with no view or an obstructed view or a view marred by an eyesore or blight on the landscape – an eyesore or a blight, like 30 acres of solar panels in full view.[8]

To argue that solar developments in other communities in other states have not adversely affected property values at those locations is meaningless. The applicant must prove that this project at this site will not affect the value of properties in this neighborhood. We'll say that again: The applicant must prove that the project will not depress property values. The applicant simply cannot do so without data relevant directly to this project in this location. Not Oregon or Tennessee or Texas or North Carolina or even another location in Cascade County, but this specific site.

The Moore letter of October 25, 2016 does not change anything. There is still no data relevant to this site. Mr. Moore suggests that power lines and railroad cars present near the site have already degraded the views to the point that a 30-acre power plant in the middle of the valley couldn't make it any worse. That is a personal opinion, not a fact. The residents know what they have now and what they won't have after, and they do not agree with Mr. Moore. He has proved nothing.

It is not the job of the opponents to prove that the project will depress property values. We should not be the involuntary guinea pigs for a grand experiment in siting solar power in residential neighborhoods. We should not be at risk, once the power plant is built, of being proved right and the applicants wrong when it is too late to do anything about it. We are legally entitled under the zoning rules to the benefit of the doubt. Given the special topography of the valley site surrounded by elevated home sites, it is simply not credible that there would be no substantial adverse effect on property values.

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[8] According to expert testimony by Bruce Forde at the July 21 hearing, because of the unique topography and the area's soil and climate conditions, a solar plant could not be shielded from the view of its residential neighbors.

The applicant has not provided "sufficient factual evidence to support" a finding with respect to property values in the relevant location.

2. The proposed development will not be in harmony with the area in which it is located. [§18.5.3]

Harmony is defined as "a pleasing or congruent arrangement of parts." [Merriam-Webster Dictionary.] In reaching a conclusion with respect to "harmony," the rules require the Board to consider the "relationship of the proposed use and the character of development to surrounding uses and development." In other words, does adding the proposed use to the surrounding uses create a pleasing arrangement? It boggles the mind to think that the answer in this case could be anything but a resounding "No!"

In large measure, the above discussion of property values demonstrates the failure of this project to be in "harmony" with the area in which it is located. There is nothing pleasing about a solar power plant in a residential neighborhood. There is nothing congruent about erecting 17,000 solar panels among homes and farms in the narrow valley of a majestic, historic river. There is no way to disguise 30 acres of solar panels on the valley floor from the elevated views of homeowners on all sides.[9]

The applicant claims that a 30-acre power plant is harmonious with high-end homes and spectacular views because – well, because it just is. The applicant also has the temerity to equate glare from solar panels to the glint of light off the beautiful Missouri River. Residents apparently are supposed to be mollified by imagining that they are looking at water instead of a power plant. If this is the applicant's concept of harmony, they should just extend the shoreline of Flathead Lake with their solar panels instead.

A pig in the barnyard is harmonious, a pig in the parlor is not. See Village of Euclid v. Ambler Realty Co., 272 US 365, 388 (1926). A power plant in a residential neighborhood is a pig in the parlor. It needs to be banished to the barnyard where it belongs.[10]

Operational Considerations

An additional standard in the rules, §18.6, requires that "[o]perations in connection with the Unclassified Use permits shall not be more objectionable to nearby properties by reason of noise, fumes, vibrations or flashing lights, than would be the operation of any permitted use." Solar plants require inverters to convert direct current to alternating current for transfer to the power grid. Inverters make noise during energy production. [See Case # CU 15-035, Marion County, Oregon Order, ¶24, p.20].

At least one discussion of the applicant's lease agreements on one of its solar power projects in another state indicates that noise, vibrations, glare and similar issues are likely to arise. "Section 20 of the lease gives the solar farm 'an easement over, under and across the Landlord's adjacent property for audio, visual, view, light, flicker, noise, vibration and any other effects attributable to the Intended Use of the Premises.'" [http://naturalgasnow.org/the-renewables-industry-green-eggs-and-scam/].

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[9] The applicant recognized that not every multi-acre vacant parcel is appropriate for a solar farm when it withdrew its application for a conditional use permit in Marion County, Oregon earlier this year. [Reported in *Statesman Journal*, 15 March 2016.]

[10] There may be other disharmonious aspects to the project, including the possible need for infrastructure components such as energy storage or backup systems, as well as maintenance of the site and eventual decommissioning and disposal of the solar components.

If the applicant considers it necessary to protect itself from liability from "audio, visual, view, light, flicker, noise, vibration and any other effects" from the solar plants it constructs on leased property, it is essential to determine whether its operations will be "more objectionable to nearby properties by . . . than would be the operation of any permitted use" of the property.

Staff Recommendations

At the July 21, 2016 public hearing, the Board received the report of the county planning staff, prepared before public comment was received at the hearing. On the two key issues presented, staff drew factual conclusions that were not justified by the record developed at the hearing.

On the issue of property valuation, the staff simply accepted the applicant's submission of out-of-state appraisals, completely unrelated to and unlike the Fox Solar site, to conclude that neighboring properties would not be devalued. On the issue of harmony, the staff again accepted the applicant's assertion that the project is in harmony with the surrounding area, even though there is nothing else there remotely resembling a power plant, just because it says so. For all the analysis that went into these two issues, the zoning rules might as well have made a solar power plant a by-right use in a residential area.

A new staff report dated November 16, 2016 once again essentially accepts the assertions of the applicant on these issues without consideration of alternative views. There are still no relevant local data on property values, meaning residents are still guinea pigs.

If the zoning rules mean anything at all, they must mean that there are situations in which an unclassified use permit would be denied for failure to meet every condition. Yet the staff reports suggest that no permit for a solar plant in any residential neighborhood would ever be denied.[11] The one caveat that the staff report applies to the Fox Solar project is "mitigat[ing] any resulting disturbance to the view shed," (since modified in the November 16 report as "the mitigation techniques proposed for softening the impact of its presence"). Competent evidence at the hearing indicated that at the Fox Solar site it is impossible to mitigate "disturbance to the view shed." If "softening" is all that the new report requires, the condition of "harmony" is no condition at all.

Conclusion

The proposed solar project is unnecessary, unsightly, and unwanted. It is totally out of character for, incompatible with, and out of harmony with the residential neighborhood in which it would be located. It will have a detrimental effect on surrounding homeowners, both in their enjoyment of spacious views and in the decline in their property values.

The applicant and the landowner are the only ones who benefit by allowing a solar plant on a residential parcel. If construction of solar power plants were a collective good for county residents, a highly dubious theory with little or no objective support in the record, it would be more fitting to site them in non-residential areas. It is solely to improve the applicant's bottom line – cheaper land and fewer infrastructure

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[11] Both the old and new staff reports essentially parrot the applicant in stating that agricultural and residential are the most common uses of property surrounding solar facilities, and that SR-1 property may be used for public buildings, educational facilities, or public institutions, which the applicant states and the staff concurs are less obnoxious than a solar plant. [Minutes of July 21 hearing; November 16 Staff Report.] Those same uses are permitted in all R zones; the necessary inference is that staff considers a solar plant to be desirable in all residential areas.

improvements -- that residential sites near power transmission facilities have been selected. The Board's duty is to protect Cascade County residents, not to increase the profits of opportunistic developers.

At the July 21 hearing, one Board member stated with regard to Portage Solar that the decision was a tough call, but he couldn't see any reason to deny it. This is exactly backwards. The Board doesn't need a reason to deny a discretionary permit; it needs many good reasons – factual evidence to support every condition in the rules – to grant it.

In the context of an application for a special use permit under the Cascade County Zoning Regulations, the Montana Supreme Court has said:

> The [applicant] bears the burden of presenting sufficient evidence to allow the board to make each of the required findings. Nothing in the CCZR compels the Board to issue a special use permit once it makes the required findings.[12]

An unclassified use permit, like a special use permit, is a dispensation from the ordinary rules applicable to a particular parcel. It is not supposed to be granted just for the asking. As we stated at the beginning, a solar plant in a residential neighborhood is an extraordinary proposition that requires a compelling justification. That compelling justification does not exist here.

The applicant has not presented "sufficient factual evidence" to justify granting the UUP. The application must therefore be denied.

Respectfully submitted,

Jack H. Blaine

Rita M. Theisen

cc: Great Falls Tribune

[12] Plains Grains Ltd. Partnership v. Com'rs of Cascade County, 357 Mont 61, 80 (2010).